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FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1207 and 1223

RIN 2590-AA87

Minority and Women Outreach Program

AGENCY: Federal Housing Finance Agency.

ACTION: Final Rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is prescribing this final rule to establish its minority and women outreach program (MWOP), pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act); and the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2008 (Dodd-Frank Act). This final rule also redesignates the current Minority and Women Inclusion (MWI) regulation (“Minority and Women Inclusion Final Rule,” “MWI Rule,” or “2010 Final Rule”), in the Code of Federal Regulations to subchapter B of FHFA’s regulations.

DATES: *Effective date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. For additional information, see SUPPLEMENTARY INFORMATION.

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SUPPLEMENTARY INFORMATION:

I. Background

A. HERA and FIRREA (July 2008)

In 2008, the Housing and Economic Recovery Act (HERA)¹ amended the Safety and Soundness Act to require FHFA to “take affirmative steps to seek diversity in its workforce, at all levels of the agency, consistent with the demographic diversity of the United States.”²

HERA also amended FIRREA³ to add FHFA to a list of agencies required to “prescribe regulations to establish and oversee a minority outreach program within [the agency] to ensure inclusion, to the maximum extent possible, of minorities and women, and entities owned by minorities and women, including financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the agency with such persons or entities, public and private, in order to manage the institutions and their assets for which the agency is responsible or to perform such other functions authorized under any law applicable to such agency.”⁴

B. Subpart B of 2010 NPR (March 2010)

In January 2010, FHFA published a Notice of Proposed Rulemaking on Minority

¹ Pub. L. 110–289, 122 Stat. 2654 (2008).

² Pub. L. 110–289, div. A, title I, sec. 1116(f), 122 Stat. 2681. 12 U.S.C. 4520(f).

³ Pub. L. 101-73, 103 Stat. 183 (1989).

⁴ Pub. L. 110–289, div. A, title II, sec 1216(c), 122 Stat. 2792. 12 U.S.C. 1833e(c).

and Women Inclusion (2010 NPRM)⁵ to implement HERA's MWI mandates. The 2010 NPRM Subparts A and C addressed the establishment and supervision of Office[s] of Minority and Women Inclusion (OMWIs) at the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Corporation (Freddie Mac), and the Federal Home Loan Banks (FHLBs) (collectively, "FHFA's regulated entities"), as well as, the Federal Home Loan Banks' Office of Finance.

The 2010 NPRM Subpart B addressed internal operations. Subpart B: (1) Outlined affirmative steps FHFA would take to promote diversity in its own workforce (as required by the HERA amendments to the Safety and Soundness Act); and (2) Established an FHFA outreach program regulation (as required by the HERA amendments to FIRREA).

C. Dodd-Frank Act, 2010 Final Rule (July 2010 – December 2010)

On July 21, 2010, after FHFA published the 2010 NPRM, but before the rule was finalized, Dodd-Frank Act⁶ was enacted. Dodd-Frank Act section 342 required FHFA and several other agencies to "develop [internal] standards" that address equal employment opportunity (EEO) and increased participation of minority-owned and women-owned business in the programs and contracts of the respective agency.⁷

FHFA was specially situated. As the only agency subject to HERA's Minority and Women Inclusion (MWI) requirements, FHFA already had published the 2010 NPRM Subpart B which, if adopted, would have fulfilled both its obligations under

⁵ "Minority and Women Inclusion; Notice of Proposed Rulemaking," 75 FR 1289 (January 11, 2010).

⁶ Pub. L. 111-203, 124 Stat. 1376 (2010).

⁷ The Dodd-Frank Act imposed MWI requirements on the internal operations of the following agencies and entities: the Consumer Financial Protection Bureau (CFPB), Federal Deposit Insurance Corporation (FDIC), FHFA, Federal Reserve Board (FRB), each of the Federal Reserve Banks, National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), Securities and Exchange Commission (SEC), and the Department of Treasury.⁷ 12 U.S.C. 5452.

HERA, and, the newly established Dodd-Frank Act section 342.

However, in December 2010, FHFA finalized its 2010 NPRM without adopting proposed Subpart B.⁸ In the preamble to the 2010 Final Rule, FHFA committed to finalize Subpart B, but not until the other agencies subject to Dodd-Frank Act section 342 began work on implementation, and FHFA ensured that its proposal aligned with the other agencies' practices.

The other agencies subsequently established their respective OMWIs, and, along with FHFA's OMWI, implemented Dodd-Frank Act section 342. FHFA drafted internal EEO standards in August, 2016. However, FHFA did not adopt the standards in a formal rulemaking, nor did FHFA fulfill the promise in its 2010 Final Rule to revisit and finalize Subpart B.

D. FIRREA Requirement to Prescribe Regulations (Current State)

The Federal Deposit Insurance Corporation (FDIC), FHFA, and Office of the Comptroller of the Currency (OCC) hold a special status among the agencies subject to Dodd-Frank Act section 342. The FDIC, FHFA, and OCC are the only agencies also subject to the FIRREA section 1216 (12 U.S.C. 1833e) requirement to "prescribe regulations" to establish a minority outreach program (the other agencies subject to Dodd-Frank Act section 342 simply were required to develop and implement the less formal "standards" referenced above). The FDIC and OCC were the original subjects of FIRREA section 1216's (12 U.S.C. 1833e) regulation requirement when FIRREA was enacted in 1989. Accordingly, both agencies published regulations establishing minority outreach programs prior to HERA, thus leaving FHFA as the only agency yet to fulfill the

⁸ "Minority and Women Inclusion; Final Rule," 75 FR 81395 (December 28, 2010) (codified at 12 CFR 1207).

FIRREA mandate section 1216 (12 U.S.C. 1833e).^{9,10}

II. Final Rule

Administratively, the final rule: (a) Fulfills FHFA’s obligation to “prescribe regulations” establishing an outreach program in accordance with FIRREA, thereby aligning FHFA’s regulations with the FDIC and OCC’s existing regulations; (b) formalizes FHFA’s commitment to EEO by rule; and (c) fulfills FHFA’s commitment in the final rule to revisit and finalize the substance of proposed Subpart B.

The final rule also demonstrates FHFA’s commitment to diversity and inclusion and provides a baseline for implementing diversity and inclusion throughout every level of the agency.

The final rule is modeled on the existing FDIC Minority and Women Outreach Program rule (FDIC Rule)¹¹ which is similar in substance to the OCC’s Minority, Women, and Individuals with Disabilities-Owned Business Contracting Outreach Program rule (OCC Rule).¹² The FDIC drafted its original rule in 1990 and amended it multiple times to conform the rule to Supreme Court decisions on affirmative action that bore upon the rule’s substance. FHFA drew heavily on the work done by the FDIC.

A. Final Rule and the Administrative Procedure Act (APA)

In the preamble to the 2010 Final Rule, FHFA noted that it reserved Subpart B of its broader Minority and Women Inclusion Rule to address the MWI-related statutory

⁹ FDIC Minority and Outreach Program – Contracting, 12 CFR part 361, and OCC Description of Office, Procedures, Public Information; Minority, Women and Individuals with Disabilities-Owned Business; Contracting Outreach Program, 12 CFR part 4, Subpart D.

¹⁰ Since HERA’s enactment, the FDIC made a technical amendment to its existing rule by changing the name of the office that oversees the FDIC’s outreach program from the “Office of Diversity and Economic Opportunity (ODEO)” to the “Office of Minority and Women Inclusion (OMWI).” The OCC made no changes to its existing regulation.

¹¹ FDIC Minority and Women Outreach Program, 12 CFR part 361.

¹² OCC Description of Office, Procedures, Public Information; Minority, Women and Individuals with Disabilities-Owned Business; Contracting Outreach Program, 12 CFR part 4, Subpart D.

requirements aimed at FHFA's internal policies. Since then, the 2010 Final Rule has evolved,¹³ and FHFA has concluded that, as an administrative matter, a new regulation under subchapter A of FHFA's regulations is necessary for the internally applied requirements. FHFA determined that separating FHFA's internal requirements from the requirements that the 2010 Final Rule imposes upon FHFA's regulated entities would be more orderly than an amendment to the existing Minority and Women Inclusion regulation.

This final rule also redesignates the current MWI regulation as part 1223 of title 12 of the Code of Federal Regulations and the new MWOP regulation as part 1207 in order to keep all FHFA regulations related to FHFA's Organization & Operations in subchapter A, and those regulations related to Regulated Entities in subchapter B. There are no substantive changes to the MWI regulation. Thus, the newly designated part 1207 renders the reserved portion of former subpart B for the MWOP rule unnecessary, however FHFA continues to reserve this subpart for future rulemakings.

Under the APA, prior notice and comment periods are not required if a rule relates to "a matter of agency management or personnel or to public property, loans, grants, benefits, or contracts." Therefore, this final rule is effective upon publication in the **Federal Register**.

III. Section-by-Section Analysis

Definitions (§ 1207.1)

This establishes that the terms used in the final rule have the same meaning as in

¹³ The 2010 Final Rule was amended to add regulated entity board diversity requirements, 80 FR 25209 (May 4, 2015), and a Notice of Proposed Rulemaking is currently out for comment to amend the 2010 Final Rule again to require FHFA's regulated entities to engage in diversity and inclusion strategic planning, 81 FR 74730 (October 27, 2016).

FHFA's Minority and Women Inclusion Regulation at 12 CFR part 1223.

FHFA Workforce Diversity; Equal Employment Opportunity program (§ 1207.2)

Section 1207.2(b) states that FHFA will comply with EEOC requirements for Federal agencies. The purpose of that explicit statement is to memorialize FHFA's fulfillment of Dodd-Frank Act's section 342 requirement to "establish standards" in a formal rulemaking (FHFA has already drafted standards internally, and, in practice, FHFA already meets the EEOC's requirements).

Section 1207.2(c) states FHFA's policy on non-discrimination. The language in that subsection incorporates provisions from a series of EEO-related Executive Orders (E.O.s) that already applied to FHFA by statute. Restating the provisions explicitly in this subsection confirms for the reader that FHFA conforms to these specific E.O.s.

Section 1207.2(d) lists the "affirmative steps" FHFA will take to promote diversity in hiring, including recruiting at institutions that serve primarily minorities or women, and, placing advertisements in media oriented toward minorities and women. The language in this subsection is drawn from HERA.¹⁴

FHFA Contracting and Diversity and Inclusion (§ 1207.3)

Section 1207.3(a) states that FHFA's OMWI has overall responsibility for diversity and inclusion in FHFA contracting.

Dodd-Frank Act's section 342 requires that FHFA develop standards for technical assistance, but there is no statutory requirement that FHFA prescribe a regulation committing to provide technical assistance. FHFA nevertheless included this provision in § 1207.3(c) of the final rule to demonstrate FHFA's commitment to diversity and inclusion and because including this provision in the final rule provides a central point of

¹⁴ Pub. L. 110-289, sec. 1124(f).

reference for potential FHFA vendors.

Section 1207.3(b) begins with a statement that FHFA's policy is to promote diversity in the contracting process. The subsection then provides a non-exclusive list of activities FHFA may engage in to promote diversity, including participating in conventions intended to promote business opportunities for minority- and women-owned businesses. Like the technical assistance provision, the list of potential activities is extracted from Dodd-Frank Act section 342.

Section 1207.3(d) provides that FHFA's OMWI will monitor that FHFA staff interfacing with the contracting community are actively promoting FHFA's Outreach Program. FDIC's OMWI established this same construct for the FDIC rule and Outreach Program with reported success.

Limitations (§ 1207.4)

This section establishes that the final rule does not create any right or benefit for any party against the United States, its departments, agencies, or entities, its officers, employees, or agents. This section forecloses any theory that the final rule subjects FHFA to any new legal liability.

IV. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act, as amended by section 1201 of HERA, requires the Director, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises with respect to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. In preparing this final rule, the Director considered the differences between the

Banks and the Enterprises with respect to the final rule's impact and the differences outlined in section 1313(f) and determined that the final rule would not adversely impact the FHLBanks or Enterprises.

V. Paperwork Reduction Act

The final rule does not contain any collection of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, including small businesses and or small organizations, must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the final rule, is not likely to have a significant economic impact on a substantial number of small entities, because the regulation merely fulfills statutory requirements that FHFA: (1) "develop standards" that apply *internally*; and (2) "prescribe[s] regulations" establishing FHFA's own outreach program.

List of Subjects

12 CFR Part 1207

Discrimination, Diversity, Equal employment opportunity, Government Contracts, Minority businesses, Outreach.

12 CFR Part 1223

Discrimination, Diversity, Equal employment opportunity, Government
Contracts, Minority businesses, Outreach.

Authority and Issuance

Accordingly, for the reasons stated in the **SUPPLEMENTARY
INFORMATION**, and under the authority of 12 U.S.C. 4520 and 4526, 12 U.S.C.
1833e, and E.O. 11478, FHFA is amending subchapters A and B of chapter XII of title
12, Code of Federal Regulations as follows:

PART 1207—MINORITY AND WOMEN INCLUSION

1. The authority citation for part 1207 continues to read as follows:

Authority: 12 U.S.C. 4520 and 4526; 12 U.S.C. 1833e; E.O. 11478.

PART 1207—[REDESIGNATED AS PART 1223]

2. Redesignate part 1207 as part 1223 and transfer to subchapter B.

PART 1223—MINORITY AND WOMEN INCLUSION

Subpart B—[Removed and Reserved]

3. Remove and reserve subpart B (consisting of §§1223.10-1223.19).

4. Add new part 1207 to subchapter A to read as follows:

Part 1207—MINORITY AND WOMEN OUTREACH PROGRAM

Sec.

1207.1 Definitions.

1207.2 FHFA workforce diversity; Equal Employment Opportunity Program.

1207.3 FHFA contracting and diversity and inclusion.

1207.4 Limitations.

Authority: 12 U.S.C. 4520 and 4526; 12 U.S.C. 1833e; E.O. 11478.

§ 1207.1 Definitions.

The terms in this part have the same meaning as in FHFA's Minority and Women

Inclusion Regulation at part 1223 of this chapter, as may be amended from time to time.

§ 1207.2 FHFA workforce diversity; Equal Employment Opportunity Program.

(a) Responsibility. FHFA's Office of Minority and Women Inclusion (OMWI) shall have overall responsibility for diversity and inclusion in FHFA's employment practices.

(b) General. FHFA shall maintain an Equal Employment Opportunity (EEO) program consistent with the Equal Employment Opportunity Commission requirements for Federal agencies and Executive Order 11478.

(c) Workforce diversity. FHFA shall not discriminate in employment against any person because of race, color, religion, national origin, sex, age, genetic information, disability, sexual orientation, gender identity, or status as a parent.

(d) Affirmative steps for workforce diversity. FHFA shall take affirmative steps to seek diversity in its workforce, at all levels of the agency, in a manner consistent with applicable law. Such steps shall include:

(1) Recruiting at historically Black colleges and universities, Hispanic-serving institutions, women's colleges, and colleges that typically serve the individuals with disabilities and majority minority populations;

(2) Sponsoring and recruiting at job fairs in urban communities;

(3) Placing employment advertisements in media oriented toward minorities and women;

(4) Partnering with organizations that are focused on developing opportunities for

minorities and women to place talented minorities and women in industry internships, summer employment, and full-time positions; and

(5) Where feasible, partnering with inner-city high schools, girls' high schools, and high schools with majority minority populations, to establish or enhance financial literacy and provide mentoring.

§ 1207.3 FHFA contracting and diversity and inclusion.

(a) Responsibilities. FHFA's Office of Minority and Women Inclusion (OMWI) shall have responsibility for diversity and inclusion in FHFA's contracting practices.

(b) Outreach. FHFA's policy is to promote diversity in its contracting process. FHFA shall establish a contractor outreach program intended to ensure that minority- and women-owned businesses are made aware of and given the opportunity to compete for contracts with FHFA. FHFA shall conduct outreach activities that may include, but are not limited to:

(1) Identifying contractors that are minority- and women-owned by obtaining lists and directories maintained by government agencies, trade groups, and other organizations;

(2) Advertising contract opportunities through media targeted to reach potential contractors that are minority- and women-owned; and

(3) Participating in events such as conventions, trade shows, seminars, professional meetings, and other gatherings intended to promote business opportunities for minority- and women-owned businesses.

(c) Technical assistance. FHFA shall provide technical assistance and guidance to facilitate the identification and solicitation of minority and women-owned businesses.

(d) Monitoring. FHFA's OMWI shall monitor that FHFA staff interfacing with the contracting community are knowledgeable about, and actively promoting, FHFA's Outreach program.

§ 1207.4 Limitations.

The regulations in this part do not, are not intended to, and should not be construed to create any right or benefit, substantive or procedural, enforceable at law, in equity, or through administrative proceeding, by any party against FHFA, the United States, its other departments, agencies, or entities, its officers, employees, or agents.

_____, March 20, 2017 _____
Melvin L. Watt, Date
Director, Federal Housing Finance Agency.
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